STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee/Cross-Appellant,	UNPUBLISHED March 23, 2006
v	No. 256845 Cheboygan Circuit Court
JOSEPH WAYNE FOWLER, Defendant-Appellant/Cross-Appellee.	LC No. 03-002699-FC

Before: Borrello, P.J., and Sawyer and Fitzgerald, JJ.

PER CURIAM.

Defendant was convicted of first-degree criminal sexual conduct, MCL 750.520b, in the rape of a four-year-old girl who was in his care. Defendant was sentenced to twenty to forty years in prison. He appeals as of right. We affirm.

Defendant's first issue on appeal is that the Double Jeopardy Clauses of the United States[1] and Michigan[2] Constitutions bar retrial because his first trial ended in a mistrial due to the prosecution's failure to disclose reports prepared by the Family Independence Agency (FIA) to the defense. We disagree.

A constitutional double jeopardy challenge presents a question of law that this Court reviews de novo. *People v Lett*, 466 Mich 206, 212; 644 NW2d 743 (2002). This Court uses the clearly erroneous standard in determining whether the prosecution intentionally goaded a defendant into asking for a mistrial and takes into consideration objective facts and circumstances of the particular case. *People v Dawson*, 431 Mich 234, 257-258; 427 NW2d 886 (1988).

The Double Jeopardy Clauses of both the Michigan and United States Constitutions protect a defendant's life or liberty from being put in jeopardy twice for the same crime. *People v Herron*, 464 Mich 593, 600; 628 NW2d 528 (2001). When a mistrial is declared, retrial is

[1] US Const, Am V.

[2] Const 1963, art 1, § 15.

allowed under the Double Jeopardy Clause where the facts show that it was defendant that requested the mistrial and the mistrial was caused by innocent conduct on the part of the prosecutor or by other factors out of his control. *Lett, supra* at 215. Where the facts show deliberate intent on the part of the prosecutor to provoke the defendant into moving for a mistrial, the Double Jeopardy Clause will bar a second trial for the same charges. *Oregon v Kennedy*, 456 US 667, 674; 102 S Ct 2083; 72 L Ed 2d 416 (1982).

Here, a mistrial was declared after statements were entered onto the record that were not disclosed to the defense prior to their admission. Before trial, the parties had stipulated to limit the testimony of the victim's mother to what she testified to at the preliminary examination. This consisted of testimony that the victim said, "Joe's big pee-pee" three or four times while being examined by doctors. However, at trial the mother testified that the victim also told her that as defendant placed her down for a nap, that he kissed her and told her he was sorry. This statement was later found by the prosecutor in a report produced by the FIA agent who conducted an investigation of the incident. This report, and the statement therein, was never disclosed to defense counsel. Because of an incurable prejudice, the court granted defendant's motion for mistrial.

The statement was offered with the first witness of the prosecutor's case-in-chief very early on in the testimony. The record does not indicate that the prosecution was in danger of losing or that she did not have enough evidence to prove her case absent this statement being offered. Looking at the facts as a whole, there is no evidence to show that the prosecution intentionally goaded defendant into moving for a mistrial; thus, double jeopardy does not bar the retrial of defendant.

Defendant's second issue on appeal is that the trial court erred when it excluded evidence of a witness's prior second-degree criminal sexual conduct conviction, thereby precluding defendant's right to present a defense. We disagree.

This Court will not overturn a trial court's decision to admit or limit the admission of evidence absent an abuse of discretion. *People v McDaniel*, 469 Mich 409, 412; 670 NW2d 659 (2003). However, where the decision involves a preliminary question of law, which will determine the admissibility of the evidence, this Court will review de novo. *Id.*

The Michigan Supreme Court in *People v VanderVliet*, 444 Mich 52, 74-75; 508 NW2d 114 (1993), adopted the approach to other acts evidence expressed by the United States Supreme Court in *Huddleston v United States*, 485 US 681, 691-692; 108 S Ct 1496; 99 L Ed 2d 771 (1988). The *VanderVleit* approach follows the rules set forth by the rules of evidence. First, the prosecutor must offer the other acts evidence to prove something other than the witness's propensity to commit the crime. MRE 404(b). Second, the evidence must be relevant under MRE 402, as enforced through MRE 104(b). Third, the trial court must determine whether the danger of undue prejudice outweighs the probative value of the evidence. MRE 403. Lastly, the trial court may provide a limiting instruction under MRE 105. *VanderVleit, supra* at 75. MRE 404(b)(1) only excludes propensity evidence and does not require the evidence to be excluded if it is offered to prove other relevant factors. *People v Sabin* (*After Remand*), 463 Mich 43, 56; 614 NW2d 888 (2000).

Defendant argues that the trial court erred in excluding Theodore Ormsbee's prior conviction for CSC-2, thereby precluding defendant from presenting a defense. Defendant and Ormsbee were acquaintances. It is defendant's argument that Ormsbee was present at the home on the day in question and that he was left alone inside the home with the children for approximately ten minutes while defendant was outside. Ormsbee told investigators that he was there that day, but later recanted and denied ever being at defendant's home on the day in question. Defendant sought to offer Ormsbee's conviction for CSC-2 as impeachment evidence in an effort to illustrate to the jury Ormsbee's motivation to lie.

The trial court was within its discretion when it ruled the evidence more prejudicial than probative. Evidence is unfairly prejudicial when there is a potential for that evidence to be given greater weight by the jury, which will logically conclude that "if he did it before, he probably did it again." *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998). The record is silent as to the nature of Ormsbee's conviction, but it was stated by the trial court that it did occur in 1992 when Ormsbee was a minor and that there doesn't seem to be any nexus to that conviction and the type of injury that took place in the instant case.

Further, defendant's right to present a defense is not diminished by the exclusion of this evidence. If defendant wishes to impeach Ormsbee on his inconsistent statements, he has every right and ability to do so. By offering the testimony of his private investigator, the police officer that made the initial report and the testimony of Ormsbee himself, defendant can adequately assert his position that a person other than himself raped the victim.

Defendant's third issue on appeal is that the trial court abused its discretion in making an upward departure from the recommended sentencing guidelines. We disagree.

This Court reviews a trial court's decision of whether a factor exists for clear error. *People v Babcock*, 469 Mich 247, 264-265; 666 NW2d 231 (2003). This Court must review de novo whether those particular factors were objective and verifiable as a matter of law. *Id*. The trial court's determination that those particular factors amounted to a compelling and substantial reason to depart from the recommended guidelines is reviewed by this Court for an abuse of discretion. *Id*. Additionally, whether *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004), applies to the instant case is question of law that this Court gives de novo review. *People v Spanke*, 254 Mich App 642, 645-646; 658 NW2d 504 (2003).

In determining an appropriate sentence for a convicted felon, the trial court is required to impose a minimum sentence within the recommended guidelines range unless departure from that range is otherwise permitted. MCL 769.34(2). A departure requires the trial court to have substantial and compelling reasons for doing so and those reasons must be clearly stated on the record. MCL 769.34(3). Additionally, the factors justifying departure should " 'keenly' or 'irresistibly grab' [the court's] attention and [the court] should recognize them as being of 'considerable worth'." *People v Fields*, 448 Mich 58, 67; 528 NW2d 176 (1995). In making its final determination, the trial court can rely upon information from several sources including: investigation reports, admissions made by defendant, or testimony presented during a preliminary examination or at trial. *People v Perez*, 255 Mich App 703, 712-713; 662 NW2d 446 (2003).

The trial court heard testimony during the preliminary examination of defendant's ex-foster sister, a fourteen-year-old girl whom defendant sexually molested in 1996 when he was approximately fourteen years old and she was six. (4/06/04, pp 7-11.) Defendant took his foster sister and her younger brother for a walk, whereupon defendant led the children into a wooded area and forced his foster sister to perform oral sex on him while her little brother was playing within earshot. The trial court took this prior misconduct, although never charged, into deep consideration in its departure from the recommended sentencing guidelines. "I can't ignore what happened in Alpena because it happened when [defendant] was thirteen or fourteen . . . the fact is that it happened, that prognosis is out there, and lo and behold, this four-year-old is victimized in this horrible fashion. That is not contemplated by the Guidelines."

Defendant argues that the trial court erred in relying on a prior act committed by defendant that he was neither convicted of nor was offered as evidence before the jury in this case. Therefore, defendant argues that the trial court violated the holding the United States Supreme Court set forth in *Blakely, supra*.

Defendant's reliance on *Blakely* is misapplied and is without merit. In *Blakely, supra*, the United States Supreme Court struck down a determinative sentencing scheme that allowed the trial judge to increase the maximum sentence based on facts that were not presented to or decided upon by the jury. The Court held that this judicial determination violated a defendant's Sixth Amendment right to a trial by jury. However, the Michigan Supreme Court in *People v Claypool*, 470 Mich 715; 684 NW2d 278 (2004), clearly extinguishes any effect the holding in *Blakely, supra*, has on the indeterminate sentencing scheme of the Michigan sentencing guidelines. *Claypool, supra* at 730 n 14. The *Blakely* majority itself clearly stated that indeterminate sentencing schemes increase judicial discretion and judicial fact finding when it said, "a judge (like a parole board) may implicitly rule on those facts he deems important to the exercise of his sentencing discretion." *Blakely, supra* at 309.

Therefore, the trial court did not abuse its discretion when it used defendant's prior uncharged sexual misconduct as a compelling reason to deviate from the recommended guidelines.

On cross appeal, the prosecution argues that the trial court erred in not scoring fifty points for offense variable seven (OV 7) because defendant's actions were both sadistic and excessively brutal. MCL 777.37(3). We disagree.

A trial court has discretion in determining the number of points allotted to the offense variables, and this Court reviews that decision for abuse of discretion. *People v Cox*, 268 Mich App 440, 453-454; 709 NW2d 152 (2005). Sentencing judges have the discretion to assess points on each variable; the points assessed will be upheld on appeal where at least some evidence in the record supports the score. *Id.* In the instant case there is no evidence to show that defendant did any more than was necessary to commit first-degree criminal sexual conduct. Defendant should be given a score of fifty points under OV 7 only if the "victim was treated with sadism, torture, or excessive brutality or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Sadism, under MCL 777.37(3), is defined as "conduct that subjects a victim to extreme or prolonged pain or humiliation and is inflicted to produce suffering or for the offender's gratification." Interpreting

this statute, the gratification element should be read as gratification in producing the harm or humiliation to the victim.

For their argument that defendant's actions should be considered sadistic, the prosecution relies on *People v Taylor*, unpublished opinion per curiam of the Court of Appeals, issued February 24, 2004 (Docket No. 240344). In *Taylor,* this Court held that a close reading of sadism under MCL 777.37(3) reveals that an act should be considered sadistic if defendant's conduct caused the victim pain or humiliation and defendant received some type of gratification. This Court erred in its analysis. The majority of rape and sexual assault cases bring along with them injuries to the victims, both physical and emotional. When a small child is involved those injuries are increased. By reading the statutory language as this Court did in *Taylor,* we would then have to conclude all cases of rape are sadistic in nature and allot fifty points to OV 7 in each sentencing proceeding. This was not the purpose of MCL 777.37(3). This statute was enacted to separate standard crime from crime that is extreme in nature. The majority of case law we have on this subject shows OV 7 scores of fifty if the crime subjected the victim to extreme physical punishment or humiliation above and beyond what is needed to commit the criminal act. See, e.g., *People v James*, 267 Mich App 675, 680; 705 NW2d 724 (2005) (where the victim was repeatedly kicked and stomped in the face and choked while unconscious).

The trial court in this case did not find the evidence to show that defendant raped the victim for the gratification of watching her in pain or that the victim's physical injuries show that defendant engaged in other acts in addition to the act of penetration in an effort to greater abuse his victim.

For the foregoing reasons, this Court must affirm the trial court's holdings.

Affirmed.

/s/ Stephen L. Borrello
/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald